IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,	)	CRIM. ACTION NO. 3:96CR30034-001
	)	
Plaintiff,	)	
	)	
v.	)	ORDER & MEMORANDUM OPINION
	)	
RAY WALLACE METTETAL, JR.,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

The court has received the defendant's June 4, 2003 "Notice of Appeal," contesting the denial by the magistrate judge of the defendant's motion for relief under Rule 41(g) of the Federal Rules of Criminal Procedure. Defendant Ray Wallace Mettetal, Jr. disputes the magistrate judge's conclusion that the substance in the government's possession is contraband. Because the magistrate judge did not clearly determine whether the substance is contraband, this court remands the matter to the magistrate judge for proceedings necessary to determine whether the substance is contraband and to conduct such further proceedings as he finds necessary.

The movant, Ray Wallace Mettetal, Jr., was tried and convicted twice by this court on charges of possession of ricin, a toxic material. After the Fourth Circuit Court of Appeals directed that the action against Mr. Mettetal be dismissed, the movant petitioned the court for return of the allegedly toxic substance. The government fought the motion on jurisdictional grounds and on the claim that the substance in government possession was contraband. Following a hearing, the magistrate judge permitted the movant an opportunity to present to the court a proposed protocol for testing the substance. After this protocol was presented to the court and the government was given opportunity to respond, the magistrate judge rejected the proposed protocol for testing the substance on the basis

that it did not satisfy the requirements of his prior order. He then ordered the government not to destroy the substance without prior approval. The movant now appeals the denial of his motion to this court.

The court begins by affirming the jurisdiction of the magistrate judge and this court with respect to a Rule 41(g) motion. Both the clear text of the rule and relevant precedent support jurisdiction over the property in question. Fed. R. Crim. P. 41(g) (replacing former Rule 41(e)) ("The motion must be filed in the district where the property was seized."); *United States v. Garcia*, 65 F.3d 17, 20-21 (4th Cir. 1995). There is no dispute in this case that the substance thought to be ricin was seized from a storage unit in Harrisonburg, Virginia, within this district. The fact that the criminal proceedings have concluded and the civil nature of the action are both irrelevant to this conclusion. Fed. R. Crim. P. 41(g); *Garcia*, 65 F.3d at 20-21. Accordingly, the magistrate judge made the proper determination that he could proceed in this matter.

Turning to the substantive issue at hand, this court finds that the magistrate judge erred in shifting the burden to the movant of the motion when he asked him to submit a proposed protocol for testing the substance. The text of Rule 41(g) provides the basis upon which an individual may move the court for a return of property:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g).

When an individual moves for the return of his property following the conclusion of criminal proceedings, the movant bears the initial burden of establishing lawful entitlement. *United States v. Bautista*, No. 98-7614, 1999 WL 366578, at **1 (4th Cir. 1999) (unpublished disposition). The movant can establish this prima facie case through a showing that the property was taken from his possession. *See, e.g., id.*; *United States v. Maez*, 915 F.2d 1466, 1468 (10th Cir. 1990). Here, that fact is not disputed, and the movant therefore has met his initial burden.

The burden then shifts to the government to show by a preponderance of the evidence that it has a legitimate reason to retain the property. *Bautista*, 1999 WL 366578, at **1. "The general rule is that seized property other than contraband should be returned to its rightful owner once the criminal proceedings have terminated." *United States v. Bryant*, 684 F. Supp. 421, 423 (M.D.N.C. 1988) (emphasis omitted); *accord Bautista*, 1999 WL 366578, at **1; *United States v. Duncan*, 918 F.2d 647, 654 (6th Cir. 1990); *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993). When the government seizes evidence for use or potential use at trial, it retains an interest that generally may overcome the defendant's ownership interest. *See* Fed. R. Crim. P. 41(g). Following trial, this particular government interest ceases to exist. *In re* Grand Jury Subpoena Duces Tecum Issued to Roe & Roe, Inc., 49 F. Supp. 2d 451, 453 (D. Md. 1999). Of course, after the evidentiary interest has dissipated, the government may assert other superseding interests, including the regulatory interest in retaining contraband. However, it is at this point that the burden shifts to the government to show that this interest exists. *Roe v. Roe, Inc.*, 49 F. Supp. 2d at 453 (citing *Martison*, 809 F.2d at 1369). To meet this burden, the government may prove that 1) the property involved is contraband; or that 2) the property involved is forfeit pursuant to some statute. *Bryant*, 684 F. Supp. at 424 (citing *United States v. Farrell*, 606 F.2d 1341, 1347 (D.C. Cir. 1979)); *Roe & Roe, Inc.*, 49 F. Supp. 2d at 453 (" '[E]ven if the seizure was lawful the government must justify its continued

possession of the property by demonstrating that it is contraband or subject to forfeiture.' ") (citing *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987)). "The standard of proof is a preponderance of the evidence." *Maez*, 915 F.2d at 1468. Upon this showing, the movant is not entitled to the return of his property. *Bryant*, 684 F. Supp. at 424; *Roe & Roe, Inc.*, 49 F. Supp. 2d at 453.

The court recognizes the concern of the government as stated in its brief addressed to the magistrate judge that placing the burden on the government in this manner would create havoc as each prisoner attempted "to reclaim their inventory upon release from prison." However, it seems unlikely in the vast majority of cases involving illegal firearms and controlled substances that the low burden faced by the government would vindicate this *reductio ad absurdum* argument. The court notes that most plea agreements contain stipulations regarding forfeiture of items seized during the course of prosecution. The cases in which this issue is most likely to arise are those similar to the current circumstances, i.e., those cases in which guilt was not proven beyond a reasonable doubt and the government has nevertheless chosen to retain property seized during the criminal proceedings. Even in these cases, the lower burden of proof applicable to the determination of whether the property is contraband may provide for cases in which "a defendant may be acquitted of the crime under the reasonable doubt standard but [still] found to possess property unlawfully." *Maez*, 915 F.2d at 1468. Furthermore, this court hesitates to permit a policy argument to override the factual circumstances of the instant case.

This court expresses no opinion as to whether the substance of this opinion ineluctably produces an outcome different from the magistrate judge's initial determination to withhold access of the substance alleged to be contraband. The court also does not wish to imply that the instructions given the movant need become the standard to which the government is held. Furthermore, this court

will leave to the discretion of the magistrate judge the decision to conduct further proceedings or to decide the case on the evidence that has been received to date.

Accordingly, it is hereby

ADJUDGED AND ORDERED

that, with the exception of the magistrate judge's instruction not to dispose of the substance without prior approval, the May 29, 2003 order denying movant Ray Wallace Mettetal's February 26, 2003 motion for return of property is hereby VACATED, and REMANDED for further proceedings.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and to the pro se defendant.

ENTERED: _____
Senior United States District Judge

_____
Date